No. 80

IN THE

Supreme Court of the United States

OCTOBER TERM—1938

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,

Petitioners,

—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF FOR PETITIONERS.

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—against—

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT,

Respondent.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Official Reports of the Opinions Below.

The opinion of the Circuit Court of Appeals (R. 555) is reported in 63 F. (2d) 248. The report of the Special Commissioner (R. 499) and the opinion of the District Court confirming his report (R. 543) are reported in 57 F. (2d) 265.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked.

(1) The decree to be reviewed is that of the Circuit Court of Appeals, dated February 21, 1933 (R. 564).

The petition for certiorari was filed May 19, 1933, and the writ was granted October 9, 1933.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347), and under Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

Your petitioner, Louis H. May, is the assignee of the owners of certain merchandise which was laden on the German Motorship "Isis", in December, 1927, at various ports on the Pacific Coast of Canada, the United States and Central America, consigned to Hamburg. Your petitioners, Indemnity Insurance Company of North America and Royal Indemnity Company, are the stipulators for libellant's costs against whom a decree for costs was entered in the District Court, and have been made parties hereto pursuant to the decision of this Court in *Hartford Accident Co.* v. *Bunn,* 285 U. S. 169. Your petitioner, Louis H. May (hereinafter referred to as "the petitioner"), filed five separate libels against the respondent (which were later consolidated under the above title) in the United States District Court for the Southern District of New York. The case was referred to a commissioner and thereafter, on his report, a decree was entered dismissing the libels. Thereafter, your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court.

The "Isis" was a general ship engaged in the common carriage of merchandise by sea. She was owned and operated by respondent. At the time of sailing from her various loading ports on the Pacific Coast she was seaworthy. While proceeding up the Weser River, on her way to Bremen, Germany, which was her first discharging port, she stranded owing to negligence in navigation, and sustained certain damage, including a 45° twist in her

steel rudder stock, which was some nine inches in diameter (R. 93). With the assistance of tugs she proceeded to Bremen, and while so proceeding she showed a marked tendency to sheer to starboard. On arrival at Bremen she was put in drydock, but the dock was not entirely pumped out, and at the time the vessel was examined (which was after dark, R. 90) the lower part of her rudder was under water (R. 89, 106, 127).

The respondent had dispatched its marine superintendent, Reichenbacher, from its head office at Hamburg, and he was present when the "Isis" was drydocked at Bremen (R. 157-8). The rudder blade could easily have been lifted out of the ship while she was in drydock, and, with the stock, straightened and replaced within 6 or 8 days time (R. 333-4, 357-8). There were large and efficient shipyards at Bremen, fully capable of effecting all repairs to the "Isis", thereby permitting the ship to sail under her own power and with her own steering facilities, of which Reichenbacher was aware (R. 44, 166, 171, 197). Nevertheless, after consultation with the head office of the respondent (R. 144, 149, 250), Reichenbacher decided that the vessel should proceed to Hamburg without being repaired, with her rudder lashed amidships and with the assistance of three tugs (R. 166). He testified that the reason the "Isis" was not fully repaired before leaving Bremen, was because the respondent, for its own purposes, preferred to have her repaired at Hamburg (R. 167, 255). Under Reichenbacher's direction the vessel set out from Bremen, some 70 miles up the Weser River, at night (R. 112), without obtaining any certificate of seaworthiness (R. 110, 185). After proceeding down the river for some six miles, she took a sheer to starboard, which the tugs were unable to control (R. 112, 182, 473, 505), and again stranded, sustaining damage which made it necessary for her to return to Bremen and there discharge and transship her cargo, in order to make necessary repairs.

When the "Isis" was examined in drydock after the second stranding, with the rudder blade entirely exposed, the lower part of the blade was found bent to starboard. The bend was estimated to be about 5°, but none of the witnesses took any steps to measure it (R. 93-4, 239-41). That portion of the blade where this bend was greatest, had been under water when the vessel was previously in drydock, on which occasion the dock was not fully pumped out.

The master testified that if he had known, when the "Isis" left Bremen, that the rudder blade had the bend in it which was later discovered when she was in drydock after the second stranding, he would not have sailed; that his sailing from Bremen with his rudder lashed amidships was based on the belief that the rudder blade was straight (R. 94-5).

Reichenbacher, respondent's marine superintendent, when interrogated about the 5° bend, testified as follows:

> "I would never undertake a thing like this if I knew the rudder blade was bent. I would not have ordered her to be sent to Hamburg if the rudder blade was bent. I would have ordered her to be put into drydock in Bremen" (R. 254-5).

When the cargo arrived at destination respondent exacted from the consignees cash deposits to secure the payment of general average contribution to the sacrifices and expenses incurred in connection with both strandings.

Your petitioner does not dispute the liability of the cargo for general average contribution in connection with the first stranding.

Your petitioner contended that the respondent was not entitled to any contribution from cargo in respect of the second stranding, and this proceeding is prosecuted to recover the amount of the deposits exacted to secure the contributions claimed in respect of that stranding.

The Commissioner (whose findings were accepted by the District Court) found that the respondent had not used due diligence to make the ship seaworthy but that she was in fact seaworthy.

The Circuit Court of Appeals found that the vessel was in fact unseaworthy, but that this fact was immaterial because the unseaworthiness did not contribute to the stranding.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held:

(1) That the "Isis" was unseaworthy when she left Bremen (R. 563).

(2) That the decision to sail the vessel in her crippled condition was made by the owner, through its marine superintendent, and not by the master (R. 560).

(3) That the unseaworthiness of the vessel did not contribute to the second stranding, which was due to negligent navigation (R. 561).

(4) That a lack of due diligence and unseaworthiness not contributing to a subsequent loss does not deprive a shipowner of the exemption granted in Section 3 of the Harter Act (Act of February 13th, 1893; U. S. C., Title 46, Sec. 192) (R. 562).

(5) That the respondent was, therefore, entitled to exemption under Section 3 of the Harter Act, and entitled to recover general average under the terms of the "Jason Clause" in the bills of lading; notwithstanding its personal intervention at the intermediate port of Bremen, and its personal responsibility for the condition in which the "Isis" left that port (R. 563-4).

Both of the lower courts correctly held that the petitioner's right to recover general average deposits was dependent on the same principles which would have governed his right to recover cargo damage.

The case, therefore, presents the following questions:

1. Where a shipowner fails to use due diligence to make his vessel seaworthy, and she is in fact unseaworthy at the time of sailing, can he nevertheless obtain exemption under Section 3 of the Harter Act, in respect of cargo losses resulting from negligent navigation, provided he can satisfy the Court that the unseaworthiness did not contribute to the loss?

2. Where a shipowner intervenes and personally orders a vessel to sail from an intermediate port knowing her to be in a crippled condition and without using due diligence to make her seaworthy, can he obtain exemption under Section 3 of the Harter Act because the vessel was seaworthy at the original port of shipment?

3. Whether unseaworthiness of a vessel which physically contributes to a loss can properly be said not to have contributed in a legal sense because its effect could have been counteracted by skill and diligence on the part of her navigators.

Specifications of Error Intended to be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

I. In holding that lack of due diligence and resulting unseaworthiness do not deprive a shipowner of the exemption granted in the third section of the Harter Act (Act of February 13, 1893; U. S. C., Title 46, Sec. 192) unless

such unseaworthiness contributes to the loss in respect of which the exemption is sought.

2. In holding that a shipowner who personally intervenes and causes his ship to sail from an intermediate port in an unseaworthy condition, through lack of due diligence, is still entitled to exemption under the third section of the Harter Act provided he complied with that section at the original port of loading.

3. In holding that the unseaworthiness of the "Isis" did not contribute to her stranding because its effect could have been counteracted by skill and diligence on the part of her navigators. We submit that this is not a true finding of fact but an erroneous conclusion of law.

POINT I.

A shipowner is not entitled to the benefits of Section 3 of the Harter Act unless he establishes as a condition precedent that his vessel was seaworthy, or that due diligence was used to make her so, irrespective of whether or not there was any causal connection between the lack of due diligence and the ensuing damage.

The bills of lading in this case contained provisions (R. 30, 37) in substantially the same form as that approved by this Court in *The Jason*, 225 U. S. 32, 49; *i. e.*, clauses which either directly or impliedly provide that if the shipowner has used due diligence to make the ship seaworthy, the cargo is to be liable in general average where the sacrifice or expense results from negligent navigation.

It is well settled under the decisions of this Court that a shipowner's right to compel contributions from the cargo owners under the clause above referred to, is subject to the same limitations as are imposed upon a shipowner who

seeks the exemptions afforded by the third section of the Harter Act.

The Irrawaddy, 171 U. S. 187, 189;
The Jason, *supra*.

The rule above stated was followed in the present case and, as far as we are aware, has never been questioned. *Cf. The West Kebar*; *American-West African Line* v. *Socony Vacuum Corp. et al.*, 1933 A. M. C. 1364, 1370 (not yet reported elsewhere). In the present case there was no substantial damage to the cargo; but the requirement of the general average deposits was a clear breach of the contracts of affreightment unless justified by facts which entitled the respondent to claim contribution.

The present case turns upon the proper construction of the third section of the Harter Act (U. S. C., Title 46, Sec. 192), which is as follows:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

It has frequently been held that the Harter Act, being in derogation of common law rights, should be strictly construed.

The Irrawaddy, 171 U. S. 187, 195;
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326, 329;
The Germanic, 124 Fed. 1, 5 (C. C. A. 2 Circ.) (affirmed 196 U. S. 589);
The Jeanie, 236 Fed. 463, 471 (C. C. A. 9 Circ.);
The Fort Morgan, 284 Fed. 1, 4 (C. C. A. 4 Circ.);
The Newport, 7 F. (2d) 452, 454 (C. C. A. 9 Circ.).

In construing the above section it is important to bear in mind that the Harter Act does not impose any liability but grants certain exemptions on certain express conditions. The first two sections of the Act (U. S. C., Title 46, Secs. 190, 191) are merely declaratory of the law as it stood before they were passed. They forbid carriers to insert in their bills of lading certain types of clauses relieving them of liability for their own negligence or the negligence of their servants. Such clauses were, of course, void at common law. *The Jason, supra*. The third section of the Act gives the carrier a conditional exemption from liability for losses due to certain specified causes. If a shipowner complies with the conditions laid down in this section, the section gives him certain protection which he already had at common law (*e. g.*, in respect of acts of God and public enemies—*cf. The Maggie Hammond*, 9 Wall. 435 at p. 444); it also gives him, *proprio vigore*, certain protection (*e. g.*, in respect of sea perils) which he could otherwise obtain by contract; and also gives him certain protection (*i. e.*, in respect of the negligence of his servants) which he could not legally obtain in any other way than by compliance with this section. A shipowner who does not comply with the condition is in exactly the same position as before

the Act was passed. He can exempt himself, by the terms of his bill of lading from liability for damage due to perils of the sea, latent defects and similar causes, but he cannot exempt himself from liability for damage due to negligence.

The argument is frequently made, on behalf of the shipowner, that Congress could not have intended to impose liability on a shipowner for something which did not cause any damage. The fallacy of this argument is readily apparent. The shipowner is not held liable because he failed to use due diligence, but because his servants have been guilty of negligent navigation. The owner's lack of due diligence merely precludes him from obtaining a statutory exemption and leaves him subject to his ordinary common law liability.

The very structure of the third section of the Harter Act clearly indicates that no causal connection need exist between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made the condition of exemption in respect of negligent navigation. If the Act were based on causal relation, one would expect that a shipowner who had used due diligence to make his ship seaworthy would be relieved from liability for losses resulting from unseaworthiness. The Act does not say this, however, and is not so construed. In *The Carib Prince,* 170 U. S. 655, at pages 661-2, this Court held that the Harter Act does not protect the shipowner in respect of damage due to unseaworthiness, even though he has used due diligence to make his vessel seaworthy.

That there need be no causal relation between unseaworthiness and damage in order to defeat the carrier's right to the exemption of Section 3 of the Harter Act, is clearly indicated by the language of this Court in *International Navigation Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218 and *The Wildcroft,* 201 U. S. 378.

In *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, *supra*, this Court said at page 225:

> "We do not think that a shipowner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship *in all respects* seaworthy, and that, in our judgment, means due diligence on the part of all the owners' servants in the use of the equipment before the commencement of the voyage and until it is actually commenced."

And again at page 226:

> "We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing."

The italicized words "in all respects" appear in the original opinion in italics. While the language "even if the loss occur through fault or error in management" was not necessary to the decision, we submit that it is a clear indication of the opinion of this Court on the precise point involved in the present case.

In *The Wildcroft*, *supra*, this Court said (pp. 388-9):

> "To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner, and where the statute has given immunity against such loss by reason of error in navigation or management, it does

> so upon the distinct condition that the owner shall show that the vessel was *in all respects* seaworthy and properly manned, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act. * * * It is only when he has discharged the burden which the law imposes upon him, and shown that he has furnished a vessel, fit and seaworthy, or has used due diligence to that end that the law relieves him of the liability which he would otherwise incur." (Italics ours.)

Again in the above quotation, this Court used the words "in all respects", which is precisely the phrase which is nullified by the decision below. It is true that the words "upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy", were not necessary to the decision in *The Wildcroft*, as this Court affirmed the decision of the court below that the vessel was in fact seaworthy. Nevertheless, the purport of these words is unmistakable.

See also *The Southgark*, 191 U. S. 1, p. 16.

The decision of the Circuit Court of Appeals on this point is contrary to a number of its own previous decisions and dicta, as well as prior and subsequent District Court decisions in the Second Circuit. We shall refer to these decisions in the order in which the cases were decided:

In *The River Meander*, 209 Fed. 931 (S. D. N. Y., 1913), the court said (p. 937):

> "Moreover, on the voyage to New York the serious and substantially constant leak in the No. 1 port

> hold, which began shortly after leaving Gibraltar, shows, in my opinion, that the ship was not seaworthy during the voyage. It is said that that leak had nothing to do with the damage to the cargo, which I think is true; but the requirement of the Harter Act is that the owner must provide a ship that is in all respects seaworthy before he can take advantage of the exemptions from liability required by that act."

In *The St. Paul*, 277 Fed. 99 (S. D. N. Y., 1921), the vessel was seized under legal process. The carrier sought exemption, under Section 3 of the Harter Act, in addition to the exemption of the fire statute, claiming that the fire which caused the loss was itself caused by the vessel's remaining in custody of the marshal. The court held (at p. 107), that the carrier's failure to exercise due diligence to make the vessel seaworthy precluded him from claiming exoneration under the Harter Act, apparently without regard to any causal connection between the unseaworthiness and the damage to cargo.

In *The Turret Crown*, 282 Fed. 354 (S. D. N. Y., 1922), the District Court found that the vessel was unseaworthy when she sailed on her voyage, but that the unseaworthiness had no causal connection with the damage to cargo sued for. Upon these facts, Judge Ward held (p. 360):

> "If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerage way did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act (Comp. St. §§8029-8035)."

Accordingly, the libel was dismissed in the District Court. The Circuit Court of Appeals reversed this decision on the ground that the damage to cargo resulted directly from the unseaworthiness of the vessel. Accordingly, the question

now under discussion was not considered or decided in that court (297 Fed. 766).

In re O'Donnell, et al., 26 F. (2d) 334 (C. C. A. 2nd Circ., 1928), two barges in tow of a tug sank and damaged their cargoes as a result of the tug's negligent navigation. Suit was filed by the owners of the cargoes of both barges, and the owner of the tug filed a petition for limitation of liability. The court ruled that the tug and barges must be considered together as a unit within the principle of *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326; and, if the condition of the statute was satisfied, that the owner of the tug was entitled to exemption from liability for damage to the cargo on the barges resulting from the negligent operation of the tug, under the provisions of Section 3 of the Harter Act. However, the court definitely ruled as part of its decision (p. 336):

> "However, it is plain that both vessels must fulfill the conditions of the exemption. In the case at bar the tug proved that she was seaworthy at the outset of the voyage. * * *. The same is not true as to the seaworthiness of the barges, as to which no proof whatever was attempted. The record as it stands is defective in this respect, and that proof must be supplied."

The seaworthiness or unseaworthiness of the two inert barges could have no possible connection with the damage resulting from the tug's negligent towage, and yet the decision of the court is clear and unambiguous that the protection of Section 3 of the Harter Act would not be afforded to the carrier without proof of the seaworthiness of the barges. The court held (at p. 337):

> "This appeal is a new trial, and we can take proof in this court of the seaworthiness of the barges. Unless the appellants choose to concede the issue, the appellees must make proof before William Parkin,

Esq., as commissioner, on whose report the case may be again brought on for final determination. If he finds the barges seaworthy, and his report is confirmed, the decree will be affirmed; otherwise, it will be reversed. The appellees must in any event bear the costs of this reference, but, if the decree is affirmed, the appellants will bear the general costs of the appeal."

In *The Waalhaven*, 36 F. (2d) 706 (C. C. A. 2nd Circ., 1929), it was found that the vessel sailed on her voyage in an unseaworthy condition, but the subsequent disaster in which she was involved had no causal connection with the unseaworthiness. Insufficiency of the bunkers made her unseaworthy; she was damaged while being forced through fields of ice. In the course of the opinion it was said, *obiter* (p. 709):

> "We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A., §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, * * *."

It will be noted that Judge Learned Hand did not state which way the question we are now considering was well settled, but his subsequent reference to this case in *The Elkton; Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 F. (2d) 700, at page 702, clearly discloses that what he meant was that it was well settled that unseaworthiness through lack of due diligence defeated the carrier's right to the exemptions of Section 3, whether the unseaworthiness had any relation to the disaster or not.

In *The Elkton* case (decided in 1931), Judge Learned Hand said (p. 701):

> "The facts do not raise a question argued at the bar: whether a ship's unseaworthiness in a re-

spect which has nothing to do with the loss, will deprive the owner of recourse to the section. The finality of our *dictum* to the contrary in *Hartford & N. Y. Transportation Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 192, we need not therefore consider, except to observe that it is contrary to *In re O'Donnell*, 26 F. (2d) 334; Id., 34 F. (2d) 925 (CCA2), and to a *dictum* in the *Waalhaven*, 36 F. (2d) 706 (CCA2). Apparently this court has not finally committed itself, and it is not desirable to add any further *obiter* discussion. Here at any rate the unseaworthiness directly caused the loss, and that disposes of the case."

In *Louis-Dreyfus et al.* v. *Paterson Steamships, Ltd.*, 43 F. (2d) 824 (C. C. A. 2nd Circ., 1930), grain was shipped at Duluth on two large steamers owned by the respondent for through carriage to Montreal, with transshipment at Port Colborne. Part of the grain was transshipped at Port Colborne on the "Advance" which stranded during the course of her subsequent voyage as a result of negligence in navigation, and her cargo was badly damaged. The carrier relied upon the exemptions of both Section 3 of the Harter Act and Section 6 of the Canadian Water Carriage of Goods Act. While the "Advance" was not a vessel "transporting merchandise or property to or from any port in the United States of America" (Harter Act, Section 3), the argument advanced was that as the contract of carriage was for through transportation from Duluth to Montreal, the carrier was entitled to the protection of Section 3 of the Harter Act. The court said (p. 826):

"We shall assume *arguendo* that Section 3 of the Harter Act (46 USCA §192) did not cover the case; verbally it only includes 'vessels transporting merchandise or property to or from any port in the United States.' The point is not raised in any event, since there is no proof of the seaworthiness of the vessels clearing from Duluth, which lifted the wheat.

> If the 'Advance' is to be identified with these, the substitution being ignored, at least all three ships concerned must be shown to be seaworthy."

Of course, any unseaworthiness of the first two vessels could have no possible connection with the negligent navigation of the on-carrying vessel. As the court found that the carrier was entitled to exemption from liability under Section 6 of the Canadian Water Carriage of Goods Act, the language we have quoted must be considered *obiter dictum*.

In *The R. Lenahan, Jr.—John J. Ryan—Carlotta*, 48 F. (2d) 110 (C. C. A. 2nd Circ., 1931), the court cited its prior decision *In re O'Donnell*, 26 F. (2d) 334, and again held that, where a tug and tow together engaged in the carriage of cargo, if the owner would secure exemption from liability for damage to cargo on the barge resulting from negligence in the navigation of the tug, under the principle of *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, there must be proof that

> "* * * the flotilla was seaworthy and well manned, an issue on which the claimant has the burden" (p. 112).

On June 22, 1933, subsequent to the filing of the petition in this case, the question whether lack of due diligence and unseaworthiness, not contributing to a subsequent loss, will deprive a shipowner of the exemption granted in Section 3 of the Harter Act, was answered in the affirmative by Judge Patterson in the case of *Merklen* v. *Johnson & Higgins, et al.*, 3 F. Supp. 897 (S. D. N. Y.). That case involved the right of a shipowner to recover general average under a bill of lading clause substantially identical with most of the clauses involved in the present case. The court (at p. 898) said:

> "The defendant concedes that this is the inevitable result upon a literal reading of the contract

of affreightment. The contention is, however, that the contract so read is too harsh, too burdensome on the shipowner, and that the agreement should be construed as permitting general average in all cases except where due diligence has not been used to make the ship seaworthy and there is a causal connection between the unseaworthiness and the danger, damage, or disaster that resulted in loss. But the clause as it stands is unambiguous; the phraseology is that of the shipowner; and it is not apparent by what process a court can change the effect of the words used.

It is said that Section 3 of the Harter Act (46 U. S. C. A., §192) furnishes an analogy; that although under the statute the carrier's exemption from liability for losses due to faults in navigation is literally conditioned upon his exercise of due diligence to make the vessel 'in all respects' seaworthy, it has been held that the carrier does not lose the exemption unless there are present both a failure to exercise due diligence as to seaworthiness and a causal connection between the unseaworthiness and the loss or damage to cargo. While the trend of decisions in this circuit seems to be to that effect, it is questionable whether the Circuit Court of Appeals has yet definitely committed itself on the point. *The Elkton* (C. C. A.), 49 F. (2d) 700; but see *The Isis* (*May* v. *Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft*) (C. C. A.), 63 F. (2d) 248."

The decision of the Circuit Court of Appeals in this case is directly contrary to the rule as announced in other Circuits. In *The Willdomino*, 300 Fed. 5 (C. C. A. 3rd Circ.), after citing *International Nav. Co.* v. *Farr & Bailey Mfg. Co., supra*, the Circuit Court of Appeals for the Third Circuit said (at p. 11):

"It follows, we think, that if the carrier fails to meet that burden he is liable for damage to the

> cargo resulting from negligence of the master and crew in the navigation or management of the vessel, and the carrier is so liable wholly without regard to whether or not there was any causal connection between the lack of due diligence to make the ship seaworthy in all respects and the loss caused by the negligence in navigation or in the management of the vessel."

The Willdomino was carried to this Court and affirmed (272 U. S. 718); but the question now under discussion was not mentioned in the opinion.

In *The R. P. Fitzgerald*, 212 Fed. 678 (C. C. A., 6th Circ.), while it appears that the unseaworthiness was causally connected with the loss, the court nevertheless indicated that there need be no causal relation between the two in order to establish the carrier's liability. The court said (p. 682):

> "The contention of the claimant that carelessness in cleaning the can was the proximate cause of the damage, and that, being excused by the third section of the act from its results as a fault or error in management, the libellant cannot recover, has no sanction in the law. This is clearly shown by Judge Addison Brown, in *The Manitoba* (D. C.), 104 F. 145, 155, 156. It will be seen that the question is not one of relative operating causes, proximate or remote. It has to do with the circumstances under which the owner of a vessel is relieved by the operation of the act from consequences for which he would have been responsible prior to its enactment, and involves his responsibility for the condition of his vessel at the inception of the voyage to carry the cargo which he has contracted to transport."

The most recent case in which this question was presented is *The Indien*, reported only in 1933 American Mari-

time Cases, page 1342 (U. S. D. C., So. D. Calif., Central Div., August 23, 1933), in which the court held that there need be no causal relation between the unseaworthiness and the loss. At page 1351, the court said:

> "I approach the ultimate question in this proceeding which is: Assuming that unseaworthiness has been sufficiently shown and that due diligence to make the ship and her equipment seaworthy has not been sufficiently proved, is it necessary for libellant to go further and prove that the damage to the 'Ammophos' was proximately caused by the unseaworthiness. I think not, especially as to the unseaworthiness because of overloading. The overloading of a ship is so fraught with danger that whenever it is satisfactorily shown, all the loss or injury that is sustained on the voyage of the overloaded ship should be imposed upon the vessel and the carrier and should not fall upon those who have shipped property or merchandise under the absolute obligation of the carrier to furnish a seaworthy vessel that is fit for the cargo to be carried at the commencement of the voyage.
>
> We find lack of harmony on this question in two circuit courts of appeal that have had occasion to consider it and neither the Supreme Court nor the Ninth Circuit Court of Appeals has directly passed upon the question as far as I have been able to ascertain.
>
> In *Willdomino* (3 C. C. A.), 1924 A. M. C. 889, 300 Fed. 5, it was held that the carrier was liable when it failed to sustain the burden of proving the seaworthiness of the ship or in exercising due diligence to make her so regardless of whether there was any causal connection between the lack of seaworthiness or due diligence and the loss. While in *Spartan*, (2 C. C. A.), 1931 A. M. C. 1, 47 F. (2d) 189, and in *Isis*, 1933 A. M. C. 396, the contrary doctrine was announced, it is to be noted that the

> *Willdomino, supra,* was affirmed by the Supreme Court, 272 U. S. 718, 1927 A. M. C. 129. However, the Supreme Court did not pass upon the question of the necessity of showing a causal connection between the unseaworthiness and the loss."

With the exception of its own dictum in the case of *Hartford & N. Y. Transp. Co.* v. *Rogers & Hubbard Co.* (47 F. (2d) 189, 192), none of the cases cited by the Circuit Court of Appeals lends any support to its decision in the present case.

The decision of this Court in *The Malcolm Baxter, Jr.,* has no bearing on the question presented here. In that case this Court held that the owners' failure to exercise due diligence to make the vessel seaworthy deprived them of any right to exemption under the Harter Act (277 U. S. 323, at p. 331). Apparently the case was cited because of the following statement in the opinion of this Court (at p. 331):

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

This statement, however, clearly has no bearing on the present case. It was made in connection with a bill of lading clause exempting the vessel from liability for "restraints of princes, rulers and peoples". This clause, of course, was perfectly valid at common law, and the shipowners, in claiming the benefit of it, did not require any aid from the Harter Act. If it had been necessary for the shipowners to rely on the Harter Act, they would have failed; for this Court expressly held that they were not entitled to exoneration under that Act. Based on a careful reading of the opinion, and on our knowledge of the case, in which we were of counsel, we feel justified in stating that the decision of this Court in the *Malcolm Baxter, Jr.,* does not lend the slightest support to the deci-

sion in the present case; and so far as it has any bearing on the present case it tends to support the position of your petitioner.

The case of *Boston Marine Insurance Company* v. *Met. Redwood Lumber Co.* (197 Fed. 703), which is also cited by the Circuit Court of Appeals in support of its decision, did not deal with the Harter Act at all, but only involved the Act of March 3rd, 1851, granting shipowners a limitation of liability (R. S. 4283; U. S. C., Title 46, Sec. 183). We respectfully submit that decisions dealing with the Act of 1851 have no possible bearing on the question which arises here under the third section of the Harter Act. It is, of course, well settled that the "privity or knowledge" which will prevent an owner from obtaining limitation under the Act of 1851, is privity or knowledge of something which results in loss or damage. This results necessarily from the express language of the Act of 1851, which grants to a shipowner a limitation of his liability for any "loss, damage, * * * or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner * * *."

In *The Thessaloniki*, 267 Fed. 67 (C. C. A., 2nd Circ.), the decision was that the vessel was seaworthy and that the loss was due to a peril of the sea and not to any negligence in navigation.

As we have already pointed out, a contractual exemption from liability for sea perils is valid at common law; its validity is not dependent upon compliance with the Harter Act. *We cannot emphasize too strongly the fact that the question presented in this case can only arise where the loss is due to "faults or errors in navigation or in the management" of the vessel. It is only in connection with such faults that the exemption from liability is wholly dependent upon compliance with the condition of the Third Section of the Harter Act.*

The decision in the present case is contrary both to the letter and the spirit of the Third Section of the Harter Act. It nullifies the condition expressly stated at the beginning of that Section and places upon the owner of cargo the burden of litigating a question which is wholly irrelevant—namely, whether the shipowner's failure to comply with the condition has contributed to the subsequent loss or damage. In the present case the petitioner was forced to litigate this issue and was defeated, although his contention was certainly logical enough on its face—*i. e.*, that the uncontrollable sheer of the "Isis", which caused the second stranding in the Weser River, was not unconnected with the fact that she had undertaken to navigate a narrow and winding channel at night with her steering gear disabled. Petitioner, of course, had no witnesses to any of the facts, and had to rely on the testimony of experts based on the fact evidence submitted by the respondent. This is precisely the situation which Congress foresaw and guarded against in phrasing the third section of the Harter Act. By that section the shipowner receives an exemption which is in derogation of the cargo owners' common law rights; but this exemption is expressly made conditional on the performance of certain duties. If the condition is not performed, the shipowner is in precisely the same position as if the Harter Act had never been passed. The third section of the Harter Act is, in effect, an offer of immunity; and, like an offer, it must be accepted according to its terms. One who makes an offer is not bound by an acceptance which includes added or different conditions, even though the person who tenders the acceptance is prepared to prove that the new conditions are equally advantageous.

We submit that to permit the shipowner to have the benefit of the third section of the Harter Act, under the circumstancess of this case, would be to ignore the plain language and the clear intent of that section.

POINT II.

Where a shipowner personally intervenes and takes charge of a vessel at an intermediate port of call and through failure to use due diligence causes her to sail in an unseaworthy condition, he can obtain no exemption under Section 3 of the Harter Act.

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen; that the owner had intervened at Bremen through its marine superintendent; and that the decision to sail the vessel at night in her crippled condition was made by the owner's marine superintendent and not by the master. It appears that the marine superintendent was in touch with the Home Office of the company, which was in Hamburg, not far away, that he was fully informed of all that was done at Bremen and assumed full responsibility. No certificate of seaworthiness was obtained from an independent surveyor; the drydock was not entirely pumped out and the only examination of the rudder was made after dark, while it was partly submerged. It is entirely clear from the evidence that the master himself would not have assumed the responsibility of sailing the vessel in her crippled condition. Nevertheless, the Circuit Court of Appeals decided, as we read the opinion, that the owner is entitled to the protection of the third section of the Harter Act, because the "Isis" was seaworthy when she sailed from the Pacific Coast. The rule laid down by the Circuit Court of Appeals appears to be that if a shipowner fulfills the condition of Section 3 of the Harter Act at the port of shipment, nothing that he does afterward will deprive him of the exemption provided in that section. He may take charge of the vessel at a subsequent port of call and render her wholly unseaworthy; but he is still entitled to the protection of the Harter Act as to any cargo loss which does not result from the unseaworthiness.

We know of no authority in support of this decision, and it is not sustained by any of the decisions cited by the Circuit Court of Appeals in its opinion. All of these were cases where the fault or negligence at the intermediate port was that of the master or officers of the ship, without the knowledge of the owners and without any intervention on their part. This was specifically pointed out in the case of *The Guadeloupe*, 92 Fed. 670, where Judge Brown said (at p. 671):

> "It was doubtless the duty of the master to use diligence in making all necessary repairs at Santos to put the ship in a seaworthy condition, and for that purpose to make such surveys as were apparently needed in order to determine what repairs were necessary. * * * If any error was committed in this respect, I think it was an error of judgment. It was an error, moreover, pertaining to the 'management' of the ship; since the question arose after the voyage had commenced, at a port of distress, *far from the home port, and away from any supervision by the owners, and was wholly subject to the master's determination.*" (Italics ours.)

Conceding the rule of *The Guadeloupe*, (*supra*), that negligent inspection or repair by the master of the vessel at an intermediate port following an accident is negligent "management", it does not at all follow that such negligence is "management" when the inspection or repairs are performed by the owner. Section 3 of the Harter Act was designed to relieve the shipowner, on certain conditions, from the common law liability founded upon the doctrine of *respondeat superior*. It may safely be said that there is no case of record relieving a common carrier shipowner from negligence of the shipowner himself. All of the cases on the subject either hold or imply that the carrier is not relieved by Section 3 of the Harter Act for negligent management or navigation of the vessel by the owner himself.

(a) The cases exonerating the shipowner for

negligent repair or inspection at an intermediate port are all cases of neglect on the part of the master.

(b) All these cases state or imply that the reason underlying the decision is that the ship is out of the owner's control.

(c) Those that speak directly on the subject say the carrier is not exempted from negligent management on the part of the owner.

The Oritani, 40 F. (2d) 522 (D. C., E. D. Pa.), affd. 54 F. (2d) 1075;

The Valentine, 131 Fed. 352 (D. C., E. D. N. Y.);

The Waalhaven, 36 F. (2d) 706 (C. C. A. 2nd Circ.);

Texas & Gulf S. S. Co. v. *Parker*, 263 Fed. 864, 867 (C. C. A. 5th Circ.).

The Humarock, 234 Fed. 716 (D. C. S. D. Ga.), is direct authority for the rule that the Harter Act does not relieve a shipowner from his own negligent navigation or management. In that case the master, through whose negligence or error the stranding occurred, was a part owner of the vessel, and the court held that the Harter Act did not exempt his interest from liability.

At pages 729-30 the court stated:

"As far as the other ship owners are concerned, Capt. Foxwell was as to them only the master of the ship, and only their employe. The court does not think that his negligence can be imputed to them. The court, however, is of the opinion, that as far as his interest is concerned, which is a 3/8 interest, inasmuch as the accident was caused by his negligence, the provisions of the Harter Act do not relieve his interest from liability to the cargo owner. The court is therefore of the opinion that, while the

cargo owner cannot in its intervening petition claim damages against the entire ship, or all the interests in the ship, it yet has a maritime lien for its damages against the 3/8 interest owned therein by Capt. Foxwell. The court does not find any direct authority on this precise point, and yet it is of the opinion that the position here taken is in accordance with the principles of equity and the provisions of the act in question.

A question somewhat similar arose under what is known as the Limited Liability Act (Revised Statutes, §§4283, 4285 (Comp. St. 1913, §§8021, 8023)), in *Re Leonard et al.* (D. C.), 14 Fed. 53. In that case Judge Brown held, that although the master, who was a part owner, was privy to the negligence which caused the loss in that case, the other innocent part owners might have the benefit of the statute. The court is of the opinion that the same principle is applicable to the case at bar."

The same conclusion was reached by the District Court in *The Oritani* (*supra*). At page 529, the court said:

"Of course, the Harter Act does not exempt owners from faults of navigation which they themselves commit or which may be said to have been committed at their command by reason of long acquiescence in a known improper practice. To recover on this theory it would be necessary to show, first, that the practice in question was the proximate cause of the loss, and, second, that it was actually known and acquiesced in by the owners."

The decision in the present case is not only unsupported by authority, but is contrary to all the authority we have been able to find on the subject.

In *The Willdomino,* 300 Fed. 5 (C. C. A. 3rd Circ.; affirmed 272 U. S. 718), the vessel loaded the libellant's cargo at Messina, Italy, for transportation to New York.

After leaving Messina, she put in at Gibraltar for bunkers, and subsequently also bunkered at Lisbon and Ponta Delgada. The amount of coal taken on by the vessel was found to have been insufficient and it was held that this rendered her unseaworthy when she sailed from these coaling ports for New York. The owners were held liable for damage to cargo resulting from a subsequent stranding of the vessel due to negligent navigation. The failure of the vessel to take on a sufficient quantity of coal was due to instructions contained in a cablegram sent by the vessel owners to the master while the vessel was in the port of Gibraltar.

At page 15 of the opinion, the Circuit Court of Appeals for the Third Circuit said:

> "The acts of the vessel in leaving Gibraltar, Lisbon, and Ponta Delgada with an inadequate supply of fuel is attributable as a matter of law to the owners of the vessel. *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *British & Marine Ins. Co.* v. *Kilgour S. S. Co.* (D. C.), 184 Fed. 174, 177. It is likewise so attributable in fact. While the 'Willdomino' lay at Gibraltar, the master received from the claimant the following cablegram:
>
> > 'Your coal requirements excessive cost of bunkers Gibraltar very high make accurate measurement remaining bunkers if not enough to make North Sydney take only enough to reach there cut down consumption in every way if fuel runs short reaching coast cut out one boiler.'
>
> As the vessel was not seaworthy when she sailed from Lisbon or from Ponta Delgada, and as the claimant did not exercise due diligence to make her seaworthy before leaving those ports, the conditional exemption provided by section 3 of the Harter Act cannot be availed of if the damage to the cargo occurred through the fault or error in navigation."

In affirming the decision of the Circuit Court of Appeals, this Court referred to the "wilful failure to take on sufficient coal" (272 U. S. 718, 727); and the opinion shows clearly that the owner was held responsible for this personal fault. In commenting, in a later case, on its decision in *The Willdomino,* this Court said (*The Malcolm Baxter, Jr.,* 277 U. S. 323, at p. 332):

> "There the officers of the vessel, *under direction of the owner,* sailed from Ponta Delgada, bound for New York, all knowing that the supply of fuel was insufficient for the voyage and intending to take the vessel to North Sidney, and we held that the deviation under the circumstances was voluntary and inexcusable." (Italics ours.)

In the opinion in the present case the Circuit Court of Appeals said, in considering the point now under discussion (R. 563):

> "In *The Willdomino* case, the fault arose at the inception of the voyage."

We submit that the court was clearly in error in making this statement. In *The Willdomino* the cargo involved in the suit was shipped at Messina, Italy, and the fault charged to the owner was in connection with bunkering at the way ports of Gibraltar, Lisbon and Ponta Delgada.

In *The Waalhaven,* 36 F. (2d) 706 (C. C. A. 2nd Circ.), cargo was laden on the vessel at Nordenham, Germany, for transportation to Wilmington, N. C., and Jacksonville, Fla. She ran out of bunkers during the course of her trans-Atlantic voyage and put in at St. Johns, N. F., as a port of refuge, to rebunker. The master had planned to take on sufficient bunkers there to complete his voyage, but he received direct cable instructions from his owners to take only sufficient bunkers to reach Louisburg, Nova Scotia, where he should rebunker for the remainder of

the voyage. In following the course ordered by the owners, the vessel sustained damage by ice and her cargo was seriously damaged. The greater part of the opinion has relation to the doctrine of deviation. However, the vessel owner urged that the master's action, in sailing from St. Johns with insufficient bunkers for the remainder of the voyage, was a mistake in management within the protection of Section 3 of the Harter Act. In dealing with this contention, the court said (p. 709):

> "Obviously this was not due to a mistake of management; *it was because of the owner's command.* We pass the question whether, not being seaworthy, she could invoke the Harter Act (46 U. S. C. A. §§190-195) at all, or whether the exception could in any case excuse a deviation. Each is, indeed, well settled, but we need only decide that, whatever the master would have done, had he been left to himself, *he was not free; as he testified, he had to follow his orders.*" (Italics ours.)

In the present case we stressed *The Waalhaven* decision in our argument and brief in the Circuit Court of Appeals, but that decision is not mentioned in the opinion of the court.

In *The Valentine,* 131 Fed. 352 (E. D. N. Y.), a steam lighter was caught in an ice jam and sank as a result of the negligence of her master in not keeping any watch. The lighter was employed in transportation in New York harbor and her owners were fully aware of the fact that after the vessel tied up at destination, no watch would be kept. In the course of the opinion the court said (p. 355):

> "But if the owners of the ship know that on the voyage, *or at ports intermediate or otherwise,* or on the seas, the fires will be banked, the water for steam allowed to get cold, and that the captain and engineer will go ashore, and the rest of the crew will

> go to sleep, and that there is no method of being forewarned of leaks, and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer, or connive at such custom or practice, such vessel is not properly manned, nor do the owners intend that the initial equipment and crew shall perform the duties for which they are provided. *If the Harter Act was expected to absolve owners under such conditions, it goes beyond its present understood purpose, and allows them to make provision for negligent acts and omissions, and for undoing on the voyage what they have done before the voyage began.*" (Italics ours.)

We submit that the principle stated or applied in *The Willdoming* (*supra*), *The Waalhaven* (*supra*), and *The Valentine* (*supra*), is sound and in accordance with the purpose of the Harter Act. If a shipowner intervenes at an intermediate port, we submit that he is subject to precisely the same responsibility, so far as the Harter Act is concerned, which rests upon him at the original port of lading. This principle applies with especial force in a case like the present, where the events at the intermediate port resulted in starting what amounted to an entirely new venture. Setting out from Bremen in tow and with the rudder lashed, can scarcely be regarded as a mere continuation of the original voyage.

If the master had personally taken the responsibility for what was done at Bremen, and the owners had been far distant and had taken no part in the decision, it may well be that the owners would still be entitled to the protection of the Harter Act. It is perfectly clear, however, that if the owners had not intervened, the master would not have taken any such responsibility. It was the owners who decided not to have the ship repaired at Bremen, and ordered the expedient of having the vessel towed to Hamburg.

In a very recent decision the Circuit Court of Appeals for the Second Circuit has held definitely that where a voyage is by stages, the owner must fulfil the condition of the third section of the Harter Act at the beginning of each stage. In that case a vessel bound from Chile to Japan was obliged to refuel at Honolulu. Because the amount of fuel taken on at Honolulu was insufficient, she was obliged to take salvage assistance, which was made the basis of a claim against cargo for general average contribution. *Glymont; U. S.* v. *American Trading Co.*, 66 F. (2d) 617. We submit that the *Glymont* cannot be distinguished from the present case. Certainly when the "Isis" set out from Bremen in tow of three tugs, with her rudder lashed amidships, she began a new and very distinct stage of her voyage,—if, indeed, this can properly be regarded as a continuation of the same voyage. The fact that the necessity for the new arrangements made at Bremen was not anticipated when the "Isis" left the Pacific Coast, is unimportant in view of the fact that the owners intervened at Bremen and themselves made the new arrangements.

Intervention by the owners was not through some minor representative. Captain Reichenbacher was the respondent's nautical director and marine superintendent (R. 88, 157). He had no superior in this field (R. 165). His office was in the respondent's main office at Hamburg (R. 165). He was sent from Hamburg to Bremen to take charge of the "Isis" by the respondent's Board of Directors, who gave him power to act for the respondent (R. 165-6).

It is clear from the evidence that Reichenbacher was the *alter ego* of the respondent, so that his "privity" or "knowledge" would have been attributable to the respondent even under the strict rule of the Limitation Statute (R. S. 4283, U. S. C. Title 46, Section 183). *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 511.

Reichenbacher testified that he made the decision that the rudder should be lashed and the vessel towed to Ham-

burg (R. 166); that he was fully aware that the Bremen shipyards could have repaired the "Isis" (R. 166); and that he made the decision for the repairs at Hamburg rather than at Bremen for the respondent's benefit (R. 167, 255). He saw the vessel in drydock and was one of those who made such examination of the rudder blade as was made (R. 158-9, 253-4). He knew that the drydock was not completely pumped out to permit visual examination of the bottom part of the rudder (R. 256). He was there and knew that the examination being made of the rudder was made during darkness (R. 253-4); and that the only test being made for straightness was to put a "small piece of wood" against it (R. 253-4, 257). He was there when the rudder was made fast amidships and saw the work done (R. 159). He had a conversation with the classification surveyor about a certificate of seaworthiness (R. 160-1), and knew that the "Isis" was sailing without an examination by the classification surveyor and without a certificate of seaworthiness (R. 168-170). He formed the opinion that it was better for the ship to sail in the daytime and knew that the ship was sailing at night (R. 161). He had the same opinion at the time he testified (R. 170). He knew that the channel of the Weser River, on which Bremen is situated, is narrow and winding, as is the channel of the River Elbe, up which the "Isis" would have to navigate to reach Hamburg, and that navigation on the two rivers is hazardous at best (R. 168).

The testimony establishes clearly that the respondent took control of the situation from the master and ordered the procedure to be followed. The master looked to Reichenbacher for guidance. He referred to Reichenbacher in his testimony as his boss (R. 129), and he testified that Captain Reichenbacher ordered the pilot and the tugs for a night sailing (R. 131).

It further appears that the course decided upon by Captain Reichenbacher was known to and approved by

the Home Office of the respondent in Hamburg. We quote as follows from the testimony of the respondent's witness, Brandt (R. 144).

> "Q. Is it not a fact that the decision to proceed to Hamburg from Bremen without repairs being made at Bremen was made by the head office in Hamburg and not by the Captain? A. Yes, by the head office, not by the Captain."

If any further confirmation is needed on this point, it can be found in the testimony of respondent's witnesses, Warns (R. 249-50) and Dahlstrom (R. 149). The testimony of these witnesses makes it clear that Captain Reichenbacher reported directly to the respondent's Board of Directors in Hamburg.

It is clear that the Home Office of the respondent knew and approved of the plan to tow the "Isis" to Hamburg without making repairs; and that this course could not have been followed without their approval.

We submit that the decision in the case now on appeal, on this issue, is necessarily in conflict with the decision of this Court in *The Willdomino* (*supra*); and is also directly in conflict with the opinions of the Circuit Court of Appeals for the Second Circuit in *The Waalhaven* (*supra*) and *Glymont* (*supra*).

POINT III.

The Circuit Court of Appeals erred as a matter of law in holding that the unseaworthiness of the "Isis" did not contribute to her second stranding because means were available to her navigators to counteract the effects of the unseaworthiness.

The Commissioner summarized his findings of fact and law in an appendix to his report, which appears at pages

533-6 of the record. The District Judge merely adopted the findings of the Commissioner, with one exception which will be mentioned later. His opinion, confirming the Commissioner's report, appears at pages 544-6 of the record. The findings of the Circuit Court of Appeals are to be found in its opinion, which appears at pages 555-64 of the record.

(a) THE RUDDER BLADE OF THE "ISIS" WAS BENT WHEN SHE LEFT BREMEN, AND THIS FACT, COUPLED WITH THE IGNORANCE OF HER NAVIGATORS THAT IT EXISTED, CONTRIBUTED TO THE SECOND STRANDING.

An examination of the findings of fact below discloses that they would not sustain the decision appealed from, even if the construction of the Harter Act adopted by the lower courts were correct.

Seaworthiness.

The Commissioner found as follows:

> "8. If the injury to the rudder blade either existed or did not exist in fact when the vessel was drydocked at Bremen, she was seaworthy for the intended voyage in tow of the tugs described with her rudder lashed amidships" (R. 534).

On its face, this finding appears to be squarely in conflict with the finding of the Circuit Court of Appeals that the "Isis" was unseaworthy. We submit, however, that the conflict is more apparent than real. That the "Isis" was not seaworthy in the ordinary sense is obvious; and that this was recognized by her navigators is shown by the fact that when she sailed from Bremen she was displaying two red lights (R. 460-73), in compliance with Article 4 of the International Rules, to warn all approaching craft that she was a vessel "not under command". A careful reading of the Commissioner's report discloses that he uses the word "sea-

worthy" in a special and limited sense. What he means, apparently, is that although the vessel was crippled and although her rudder, in addition to being lashed amidships, may also have been distorted, it was possible, by the use of the steamer's own engines and the power of the tugs, to counteract these defects.

The Bend in the Rudder.

As to the existence and effect of the bend in the rudder blade of the "Isis", the Commissioner found as follows:

> "3. The injury consisting of a 5° set in the rudder blade was not a contributing cause of the second stranding. If the injury existed, and further if it was sufficient to affect at all the steering of the 'Isis', the power of her engines and the tugs was adequate to correct any tendency to sheer, and there was in fact no difficulty in controlling the 'Isis' until near kilometer 17" (R. 533).

(In connection with the last statement above quoted, we call attention to the fact that it was near kilometer 17 that the vessel was called upon, for the first time after leaving Bremen, to change her course sharply to port, owing to the pronounced bend in the channel at that point; R. 96; Chart, Resp. Ex. 9, R. 548).

> "4. The injury to the rudder blade itself consisted of a set or bend beginning about the middle or below the middle of the rudder and running to a maximum of about 5° from the median line of the vessel at the extreme bottom of the rudder. This injury existed at the time of the second docking at Bremen. There is not any direct evidence that it existed or was known or thought to exist at any time prior to the second docking. The injury may have been caused by the first stranding. It probably could not have been caused by the second

stranding. It might have been due to some occurrence on the two trips up the river and the one trip down the river, but there is no evidence of any such occurrence. It has not been established by the preponderance of the evidence that the injury to the rudder blade in fact either existed or did not exist at the time the vessel sailed from Bremen. The origin of the injury is left to conjecture" (R. 533-4).

(Both the District Court and the Circuit Court of Appeals found that the bend in the rudder blade existed when the "Isis" left Bremen. The Circuit Court of Appeals said;

> "Concededly the vessel had her rudder stock twisted and the lower half of the rudder blade was deflected to starboard 5°" (R. 562).

While the District Judge made no express finding on this point, it is clear from his opinion (R. 545) that he took the same view.

It would seem, therefore, that this fact has been established by concurrent findings of the two lower courts, notwithstanding the Commissioner's finding that it was left in doubt. However, in our view of the law, it makes no difference whether the fact is established or left uncertain. Accordingly, we shall not deal with the evidence in our argument, but shall discuss it in an appendix to this brief, to which the Court may refer if the question is deemed material.)

> "5. The preponderance of the direct evidence, the manoeuver book (Exhibit 7), and the report of the Seeamt investigation (Exhibits A and B) is that the 'Isis' did not develop any *marked tendency** to sheer to starboard on the way down the river before the second stranding; and that if there was any

* *Italics ours.*

such tendency to sheer, the power of the vessel and her tugs was amply sufficient to correct it and to control the vessel" (R. 534).

The Circuit Court of Appeals apparently adopted the finding of the Commissioner on this point. It stated that the bend in the rudder blade was unimportant because

> "competent navigators testified that a 5° bend would not affect the steering *except to a slight extent*"* (R. 562).

Due Diligence.

The Commissioner found as follows:

> "11. Due diligence was not exercised to ascertain the true condition of the rudder at Bremen in that, (a), the rudder could as a practical matter have been taken off altogether for examination or repair; (b), the rudder was not wholly exposed by the examination which was made; (c), the examination was made under unfavorable conditions in the twilight or early evening darkness, and (d), the examination was made without the attendance of a classification or independent surveyor" (R. 535).

The Circuit Court of Appeals made no finding on the question of due diligence at Bremen, as this question was immaterial in its view of the law.

The findings above quoted may be summarized as follows:

1. The owner failed to use due diligence in examining the rudder of the "Isis" when she was dry-docked after the first stranding.

2. As a result of this failure of the owner, the bend in the rudder blade was not discovered. (This is according to the opinions of the District Court and

* *Italics ours.*

the Circuit Court of Appeals. The Commissioner's finding was that, owing to the inadequate examination, the evidence did not establish whether or not the blade was bent when the steamer left Bremen.)

3. The bend in the rudder blade may have had some tendency to make the vessel sheer to starboard; but this tendency could be offset by the use of the vessel's engines coupled with the manoeuvering power of the tugs.

4. Under these circumstances, the defective condition of the vessel did not contribute, in a legal sense, to the second stranding.

We submit that the last of the above findings is not a true finding of fact, but is an erroneous conclusion of law.

In this connection, we call attention to a point on which the Commissioner made no definite finding, but which he discussed in his report. As we have already stated, the master of the "Isis" and Mr. Reichenbacher, the respondent's marine superintendent, both testified that they would not have permitted the "Isis" to sail if they had known her rudder was bent. On this point the Commissioner said:

> "I should have little difficulty in coming to the conclusion that the 5° deflection in the rudder blade had nothing to do with the stranding, did not render the vessel unseaworthy, did not substantially increase the risks of towage, and is generally an immaterial circumstance, were it not for the fact that two of the respondent's witnesses testified very definitely that they would not have sent the vessel on her voyage to Hamburg if they had thought that the rudder of the '*Isis*' was in the condition in which it was afterwards found to be. (Exhibit 13 Reichenbacher, 121; Exhibit 14, Krueger, 67.)*

* (The references to the present record are 254-5; 94-5.)

> It is urged by the respondent that these witnesses may not really have had in mind whether the bend afterwards found was really dangerous, and perhaps merely meant that they would not have sent the vessel to sea if her rudder had been in really dangerous condition. I do not so interpret their evidence, and perhaps technically the respondent is bound by their admissions. My own inference from this evidence is that these two witnesses merely overdid an effort to establish a character for caution. In spite of what they say, it is extremely difficult to believe that they really would not have sent the *'Isis'* on her voyage under tow, even if they had known of a 5° deflection in her rudder blade". (R. 524-5).

From the foregoing it appears that the Commissioner found difficulty in accepting the testimony of the respondent's own master and marine superintendent that they would not have sailed the "Isis" with a 5° bend in the rudder blade; and this notwithstanding the fact that both of these witnesses testified by deposition, and the Commissioner never saw either of them. This somewhat extraordinary attitude on the part of the Commissioner was based on the testimony of experts who had never seen the "Isis". He placed particular reliance on the testimony of a Captain Davis. We quote from the report as follows:

> "On the issue of whether or not it was safe on the trip to Hamburg, assuming that the 5° set in the rudder blade actually existed on sailing from Bremen, considerable expert testimony was produced and hypothetical questions were asked and answered, with the usual inconclusive result. With the exception of the witnesses examined by the respondent abroad, most or all of the expert witnesses lack sufficient familiarity with the actual conditions to go very much beyond generalities. Indeed, even the generalities were not sup-

ported with any persuasive reasons except in the case of Captain Davis, whose appearance and candor in testifying were even more impressive than his experience covering over thirty-three years' activity in salvage work, during most of which time he has been a well-known wreckmaster. He was extremely careful to confine himself to his own knowledge and experience and to the facts actually developed by the testimony and exhibits. His frankness in redirect examination concerning the relative desirability of navigating in daylight or darkness illustrates his attitude in testifying.

Captain Davis considered that the fact that the 'Isis' left Bremen about 5 feet by the stern was of material assistance in controlling the vessel at slow speed with the assistance of tugs. He declared that the tugs as described in the Hamburg testimony were properly located. *While a 5° deflection from the true in the rudder might have affected the steering of the vessel to some slight extent, the tugs provided should have been amply able to overcome any such defect*"* (R. 522-3).

In view of the importance which the Commissioner attached to Captain Davis' testimony, we call this Court's attention to the following testimony of the same witness:

"Q. It would be very important and valuable to know that there was such a bend, would it not? A. Yes.

Q. So that you would know what to expect? A. Yes.

Q. Even a 5 degree bend on there would affect the ship some? A. Yes.

Q. If I understand, you think 15 degrees would be dangerous? A. Yes.

Q. 10 degrees, I gather you think somewhat on the borderline? A. Yes.

* *Italics ours.*

Q. 5 degrees you think can be taken care of? A. Yes.

Q. But you agree with me that the pilot should know it is 5 degrees for it to be prudent for the ship to go out, isn't that true? A. Yes, he should ascertain that the rudder was reasonably straight or turn it loose, not go and tie it up with a bend in it" (R. 407-8).

This is the testimony of respondent's principal expert. It was on the basis of his testimony that the Commissioner found difficulty in accepting the positive statements of the respondent's master and marine superintendent that they would not have sailed the "Isis" with the bent rudder if they had known of it. And yet, even this witness agrees that the navigators of the "Isis" should, at least, have known what the condition of the rudder was; and that if the rudder was bent, it would have been better to let it swing free instead of lashing it admiships. The Commissioner so understood Captain Davis's testimony, as appears from the following passage in his report:

> "The respondent's witnesses gave no explanation of why the rudder was not lifted and the libellant submitted evidence that this course was practical and prudent. *Indeed, Captain Davis thought it would have been better to leave the rudder entirely loose or to take it off altogether.*
>
> This examination left uncertain too much concerning the condition of the rudder blade to be adequate within the very strict rule to which the authorities adhere" (R. 527).*

Moreover, Captain Davis testified as follows:

"By the Commissioner:

Q. Would your answer be any different, Captain Davis, if the rudder in fact was not straight but was deflected from the true about 5 degrees, running from

* *Italics ours.*

> nothing at the center to the maximum of 5 degrees at the bottom? A. May I see the shape of the rudder (referring to Exhibit 6) *if that was ascertained, the rudder could be secured in such a position that the effect would be neutral*" (R. 400-1).*

Captain Davis clearly had in mind that if the rudder was bent it would not be lashed amidships, but in such a position as to neutralize the bend. Of course, nothing of the sort was done because the bend was not discovered and, hence, no steps were taken to neutralize it. The rudder was lashed squarely amidships.

In view of Captain Davis' testimony, we think there can be no doubt that the failure to discover the bend and provide against it was a serious omission. The District Court, although accepting the findings of the Commissioner in other respects appears to have assumed that the bend existed when the "Isis" left Bremen, and made the following comment:

> "Furthermore, no one was aware of the deflection of the blade and consequently no allowance for it could have been made in navigation" (R. 545).

No court has found that the bend in the rudder blade did not physically affect the steering of the "Isis". The Commissioner found that the vessel did not have any "*marked* tendency to sheer"; and the Circuit Court of Appeals found that the bend would not affect the steering "*except to a slight extent*". It is abundantly clear that both the Commissioner and the Circuit Court of Appeals found: not that the bend in the rudder did not physically affect the steering of the "Isis"; but that the effect was slight and could readily be corrected by the means available. We submit that this finding presents a clear question of law which was wrongly decided in the lower courts.

* Italics ours.

Even before the passage of the Harter Act this Court rejected the argument that a shipowner was entitled to exemption from liability on showing that the proximate cause of the loss was an excepted peril. Even where no express condition was involved, it was held that the shipowner must prove that no cause for which he was responsible contributed to the loss. *The Edwin I. Morrison*, 153 U. S. 199, 211, 215. Where the exemption from liability is expressly conditional, as under the Harter Act, the same principle applies with even greater force.

In the case of *The Elkton; Comp. Gen. Tabacos de Filipinas* v. *U. S.*, 49 F. (2d) 700, the Circuit Court of Appeals for the Second Circuit rendered a decision which is very closely in point. In that case the ship sailed with a tank top which it was thought might be defective. A surveyor recommended that the tank be left empty or slack. The master knew of this recommendation but there was no evidence that the chief engineer did. At a way port the chief engineer ran up the tank with oil and it immediately leaked into the cargo hold and damaged the cargo. We quote from the opinion as follows (at p. 701):

> "A ship may be seaworthy, though not in all respects fit for her service, when she breaks ground. (*The Sylvia*, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241; *International Navigation Co.* v. *Farr*, 181 U. S. 218; 21 S. Ct. 591, 45 L. Ed. 830; *The Steel Navigator*, 23 Fed. (2) 590 (C. C. A. 2); *The President Polk*, 43 Fed. (2) 695 (C. C. A. 2); *The Manitoba*, (D. C.), 104 Fed. Rep. 145). The theory is that if she be well found in hull and gear, *but the master and crew know that she is not made ready as she rides*, and expect to fit her with what is at hand, when the occasion arises, the owner is discharged; it is an error of management if they fail to do so. But existing unfitness, though it arise only from ill handling of adequate equipment, *must be so known at the outset; else*

she is unseaworthy, not being herself suited for her service, and not carrying a crew properly advised as to her needs. (*The Schwan*, L. R. (1909) App. Cas. 450; *Standard Oil Co.* v. *Clan Line*, L. R. (1924) App. Cas. 100). *Thus seaworthiness may depend upon the knowledge of the ship's company as to how far she has been in fact made ready.* The case at bar is an effort to extend this doctrine to a case where the ship is not sound in hull, on the ground that her fault was known. It is argued that the error is still only one of management, provided of course that, if properly handled, she can be made to serve her purposes.

The gloss thus put forward—without the support of any authority—would extend the doctrine to cases *where a crippled ship is turned over to a crew with instructions so to use her as to avoid the consequences.* She will be seaworthy if the crew prove duly attentive. *For instance, if the rudder be bent, the quartermaster may be instructed to make proper allowance in his helm;* if the boilers be weak, the engineer, to keep a low head of steam." (Italics ours.)

* * * * * * * * * *

"These (speaking of the ship's holds) were suitable for sugar only if the tank was not filled, *that is, in the event that the engine-room took care not to use the ship for her normal purposes.*

Section three of the Harter Act (46 U. S. C. A. §192) gives a privilege to the owner, an immunity dependent upon the condition that he use diligence to make his ship 'in all respects' seaworthy, within as well as without. When he does, he is excused from what would otherwise be a breach of his contract, a liability in tort, if one choose, in any event a wrong under the maritime law. By hypothesis he stands at fault but for his compliance with the statute, which then imposes upon the shipper the risk of those

lapses in duty of the owner's servants for which he is ordinarily responsible. When the owner accepts cargo in an unseaworthy ship, the defect be such as may be neutralized by care, *he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas.* It makes no difference whether the defect is in shell or hold; with her whole management the owner is charged unless he does his part. In the case at bar it is therefore immaterial whether the engineer knew that he should not fill the tank. If he did, his forgetfulness, or supposition that the oil would not reach the sugar, was a fault, in management it is true, *but in the management of a ship which required more care than the owner could exact at the shipper's peril.* If the engineer did not know, at least the master did, and his fault is also the owner's." (Italics ours.)

We submit that the facts of the present case present the same question as that decided in *The Elkton.* In an example put by the court in that case, it was suggested that a ship with a bent rudder might be sent out with instructions to the quartermaster to counteract the bend. The court pointed out that if the ship's equipment was used normally but damage ensued because the special instructions were not followed, the vessel owner would not be afforded any protection under the Harter Act. A carrier may not impose on a cargo owner the added risk that the carrier's servants "may neglect those added precautions which her condition demands."

The "Isis" was a crippled ship turned over to her officers to navigate to Hamburg as best they could. She could not be navigated normally because her rudder was lashed.

Furthermore, no special instructions were given nor were special precautions taken in relation to the bend in the rudder, because its existence was not known by reason of the carrier's negligence, as the Commissioner has found.

The respondent chose, for its own purposes, to have the "Isis" navigate to Hamburg with the rudder lashed, although there were ample facilities for repairs at Bremen. In a similar connection the court said in *The Elkton* (p. 701):

> "he (the cargo owner) bears no loss until the (ship) owner has done his best to remove all risks except those inevitable upon the seas."

The Commissioner found that the "Isis" was negligently navigated at too great a speed and too near the bank and that this caused her to "smell" the bank and become unmanageable when passing an ascending vessel. Of course the speed would not be of any importance in relation to "smelling" the bank unless the "Isis" was close to the bank. The only reason advanced either by the respondent or by the Commissioner why the ship was so close to the bank, is that the flotilla made up of the "Isis" and her tugs had a breadth of about 100 feet and that at the place where the upbound vessel was passed, it was necessary for the flotilla to go close to the bank. The respondent has specifically urged that it was grossly negligent for the "Isis", *in her condition*, to attempt to pass the up-bound ship where she did.

It will be noted that the allegations and findings of negligence are that proper care was not employed in navigating the "Isis" under the abnormal conditions presented: with tugs on each side. If she had been navigating normally, she would not have been in convoy of tugs; her beam of 50 feet would have afforded ample room so that the "Isis" could have passed the ascending vessel and left 100 feet between her starboard side and the bank.

So far as concerns speed, the Commissioner found that upon passing the upbound vessel her speed was more than her average speed between Bremen and the place of stranding. We have pointed out that the officers were entirely ignorant of the bend in the rudder. Therefore, they could have had no knowledge that an increased speed would increase the danger of sheering to starboard. The respondent's experts were in accord that the greater the speed of the vessel, the greater the danger of sheering because of a bent rudder (French, R. 393; Davis, R. 407; Huseby, R. 453). We submit that the negligence found by the Commissioner is just the type of negligence which, as pointed out in *The Elkton*, is not within the exemptions of Section 3 of the Harter Act.

The facts of the present case afford a striking illustration of the results which may be expected if the courts relax the condition on which the 3rd Section of the Harter Act grants exemption from liability. In the present case the only finding on the subject is that due diligence was not used to ascertain the condition of the rudder blade. The master of the vessel and the respondent's marine superintendent both testified that they would not have sailed the "Isis" if they had known of the bend in her rudder blade. No one who had anything to do with the vessel contradicted them. The blade was bent to starboard, which would tend to throw the vessel's bow to starboard. The stranding occurred because the vessel actually sheered to starboard. Even the respondent's principal expert on this point (and the only one who had ever commanded a vessel at sea) agreed that the rudder should have been lashed in a position which would neutralize the bend; or, better still, should have been left swinging free or removed altogether. Notwithstanding all of these circumstances, the lower courts have seen fit to discard the testimony of the master and marine superintendent, who actually sailed the "Isis"; to hold, on the basis of expert testimony, that the condition

of the rudder blade did not constitute any ground for not sailing the vessel; and to decide that it did not contribute legally to the stranding because the tugs had ample power to counteract it.

Such results are possible only if the 3rd Section of the Harter Act can be radically amended by judicial legislation.

(b) THERE IS A COMPLETE ABSENCE OF PROOF THAT THE NAVIGATORS OF THE "ISIS" WERE COMPETENT TO DIRECT THE MOVEMENTS OF THE FLOTILLA WHICH UNDERTOOK TO NAVIGATE THE WESER RIVER AT NIGHT.

The channel of the Weser River is about 300 feet wide. The combined width of the "Isis" and the tugs alongside was about 100 feet (R. 515). The Commissioner assumed that ordinary prudence required a clearance of approximately 25 feet on each side (R. 515). Accordingly, the "Isis" required a full half of the channel in which to navigate safely. Considering that the channel of the Weser is not only narrow but tortuous, it is clear that considerable skill is required to navigate a large vessel from Bremen to the sea, even under the best conditions. This was conceded by respondent's marine superintendent, Reichenbacher (R. 168). In the present case the "Isis" had no steering power of her own, excepting such as could be developed by the use of her twin screws. She was dependent chiefly on the three tugs to steer her down the Weser. No system of signals was agreed upon for this purpose, but the manoeuvers of the tugs were directed from the bridge of the "Isis" through a megaphone. It appears that the orders were given by the pilot to the master, and were then transmitted by the master to the tugs through the megaphone (R. 81). Obviously this was a very slow and cumbersome method of steering the "Isis". A vessel of her type is ordinarily steered by steam steering gear operated by a quartermaster under the orders of a navigating officer who stands beside

him. The response to an order is practically instantaneous. Certainly the navigation of such a flotilla as was involved in the present case, is a wholly different problem from the navigation of an ordinary vessel which has the use of her rudder. The Commissioner based his findings largely on the testimony of Captain Davis, and refers to the latter's experience "covering over thirty-three years' activity in salvage work, during most of which time he has been a well-known wreckmaster" (*supra*, p. 41). No doubt Captain Davis' experience was such that he would have been qualified, if any one was, to navigate the "Isis" flotilla. There is no evidence, however, that either the master or pilot of the "Isis" was qualified by training or experience for such a task. The master expressly disclaimed sufficient knowledge of local conditions to pilot the flotilla; and it is clear from his testimony that the pilot was actually directing the navigation (R. 97). The pilot died before the reference in this case, and there is no evidence whatever that he was qualified to navigate a large disabled vessel and three tugboats down the Weser River at night. It may, perhaps, be assumed, without evidence, that he had the ordinary skill of a river pilot; but we submit that there can be no such assumption as to his ability to navigate a flotilla of the kind and under the conditions here involved. The event shows, on respondent's theory, that he handled the flotilla unskillfully; and the record is barren of any evidence that he had the necessary skill or experience to handle it at all. We submit that this situation falls squarely within the language of this Court in *The Wilderoft*, *supra* (p. 388), where it said that the immunity given by the Harter Act is granted

> "upon the distinct condition that the owner shall show that the vessel was *in all respects* seaworthy and *properly manned*, equipped and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. The discharge

> of this duty is not left to any presumption in the absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act." (Italics ours.)

The Circuit Court of Appeals found that the "Isis" was unseaworthy when she sailed from Bremen. The opinion indicates that the court had in mind unseaworthiness of the flotilla as a whole. We submit, as a matter of law, that it cannot be said that such unseaworthiness did not contribute to the stranding. The immediate cause may have been, as claimed by the respondent, an error of the pilot. The record throws no light on the question whether this error arose through negligence or lack of skill. In either event, it is plain that the unwieldy character of the flotilla was a contributing factor in the disaster.

Conclusion.

We submit that a shipowner who sends his vessel to sea in an unseaworthy condition, through lack of due diligence in that respect, cannot apportion or qualify his fault. The courts below have held, in effect, that a shipowner who does not use due diligence to make his ship seaworthy is still not liable for negligent navigation if she is seaworthy in most respects; and if her unseaworthiness contributes only slightly or indirectly to the subsequent disaster. This is not what the Harter Act says; and, we submit, it is not the law.

The decree of the Circuit Court of Appeals should be reversed.

Dated, November 2, 1933.

Respectfully submitted,

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APPENDIX.

It is Established by the Great Preponderance of the Evidence That the Rudder Blade of the "Isis" was Bent to Starboard at the Time of the First Stranding.

As stated in our brief (*supra*, p. 37), the liability of the respondent would appear to be the same whether it is established that the rudder blade of the "Isis" was bent when she sailed from Bremen as found by the District Judge and the Circuit Court of Appeals, or whether this fact is left in doubt as found by the Commissioner. However, we think the evidence on the point is entirely clear and we shall summarize it in this appendix in order that it may be conveniently considered if deemed material.

The Commissioner's finding as to the bend in the rudder blade is as follows (R. 534):

> "This injury existed at the time of the second docking at Bremen. There is not any direct evidence that it existed or was known or thought to exist at any time prior to the second docking. The injury may have been caused by the first stranding. It probably could not have been caused by the second stranding. It might have been due to some occurrence on the two trips up the river and the (fol. 671) one trip down the river, but there is no evidence of any such occurrence."

The Commissioner finds, therefore, that the bend in the rudder blade may have been caused by the first stranding and probably could not have been caused by the second stranding. He also finds that there is no evidence of any other occurrence which might explain the bend. Under these circumstances it would only seem necessary to refer the Court to some definite and persuasive evidence that the

bend not only "may have been caused" but actually was caused at the time of the first stranding.

The officers of the "Isis" are in accord that when she slid off the bank after the first stranding, she hit her stern on the port side against the opposite bank (R. 55, 260-1, 278). The Commissioner found (R. 503):

> "Most, if not all, of the force of the blow fell on the port side of the rudder * * *."

As a result of the impact it was found that the rudder stock, between 225 and 250 millimeters (about nine inches) in diameter (R. 93), had become twisted. The translation of the ship's deck log (Resp.'s Ex. 11, R. 480) includes this language describing the movement when the ship slid off the bank.

> "The ship's stern was then swung around with terrific force by the heavy flood tide, which was made worse by a wind blowing against her beam (WSW force 5). * * * Due to the rapid turning motion of the ship, the two towboats could not go into action in time to catch the fast swinging ship. Because the water was not high enough as yet to let the ship swing around in the narrow channel, she ran with her stern forcibly against the easterly bank and went aground" (R. 481-2).

Captain Krueger agreed that the log book entry was correct; that the "Isis" turned with terrific force (R. 86) and that she hit her rudder against the port bank with great violence (R. 86).

The libellant's experts testified that the impact of a rudder blade with a bank of sufficient severity to twist the rudder stock to the extent this one was twisted, would almost certainly lead to damage to the blade. They agreed that rudder stocks are sometimes twisted without damage to the blade as the result of waves hitting the rudder, and they also agreed that if any pressure is exerted equally

over the face of the blade, the stock might be bent without the blade being bent. That, also, was the purport of the testimony of the respondent's experts: that if the blade is subjected to an even pressure over its entire surface, the stock could be twisted without affecting the blade.

The respondent's argument that the first impact did not damage the rudder blade, must have as its premise that the whole surface of the blade hit squarely against a perpendicular wall of mud (French, R. 384; Jordan, R. 343-4; McGregor, R. 371). There is no evidence establishing any such condition. The bend subsequently found in the rudder blade, was of a type which naturally would result from such an impact as that described here (R. 348, 356).

No trouble of any kind had been experienced in steering the ship prior to the first stranding. Immediately afterwards the vessel was found to sheer violently to starboard and she was navigated to Bremen with the assistance of tugs, with difficulty.

It is the libellant's position that the bottom of the rudder blade became bent as a result of the first stranding and as the bend was not discovered at Bremen, that it existed when the ship sailed from Bremen.

When the ship was examined in drydock after the second stranding, the respondent's witnesses are in accord that the bottom of the rudder blade was bent to starboard. It is true that the witnesses who examined it estimated that the bend was only about five degrees, but not one of them took any steps to measure the bend. Their testimony is merely a rough estimate given at the time of their depositions in August and October, 1930, of a bend which they had examined more than two years before, in February, 1928 (Asmus, R. 240-1; Krueger, R. 67-8).

The respondent argues that the bend in the rudder blade did not exist when the ship sailed from Bremen, but

resulted from the second stranding. This, of course, is contrary to the Commissioner's finding that "it probably could not have been caused by the second stranding."

In support of its argument the respondent has relied on the master's testimony that a short time before the second stranding, the vessel twice touched lightly aft. The log book contains no reference to any such touching, nor was it mentioned in the testimony taken before the Seeamt. No such occurrence was known to the engineers (R. 122) although they naturally would be the first ones to observe it (R. 331). The master admitted that the tugs were bumping the side of the "Isis" so that little notice was taken of the jar which he thought was a touch a[illegible] (R. 122).

According to the master's testimony, the ship was sailing down the river on the starboard side of the channel (R. 98). She passed to the port side of the buoy marking the starboard edge of the channel (R. 66-7, 102) at the junction of the Weser and the Lesum (R. 102-3). It is said that after passing this buoy, the current flowing up the Lesum River swung the bow of the "Isis" to starboard (R. 68), and, following natural laws, the stern, therefore, must necessarily have swung to port. When the "Isis" brought up, the testimony is clear that her stern was in the channel of the Weser River in deep water (R. 67, 104). All the witnesses are in accord (and of course it is common sense as well), that if the rudder blade had hit against the starboard bank, any bend which resulted would necessarily have been to port, or, if the rudder was already bent to starboard, would tend to straighten it somewhat.

The suggestion was advanced in the respondent's examination of its experts, that when the stern of the "Isis" swung to port, the rudder blade may have been bent to starboard by hitting bottom. There is no evidence that any such thing occurred; the master took the position that the ship's stern hit the starboard bank (R. 102-3).

To be persuasive, moreover, there must be evidence that there was a shallow spot which permitted the stern to hit, and there is no evidence supporting such a suggestion. In fact, the evidence is to the contrary.

When the "Isis" was examined in drydock after the second stranding, her stern post was not damaged (R. 134). Exhibit 6, the plan of the "Isis", shows that the stern post was approximately two feet lower than the rudder (R. 496-A). We submit it is impossible to understand how the rudder blade could be bent by contact with the river bottom without causing any damage to the stern post. As Mr. Jordan testified, it would be necessary to have an extraordinary condition to permit some obstruction to dodge the stern post and reach up and bend the rudder (R. 331, 356-7).

However, we submit that the testimony of the respondent's witness, the chief officer, disposes of this whole issue. After testifying that at Bremen the rudder blade was made fast with wire lines to bitts at the after end of the ship, he testified concerning the method employed to make fast the quadrant with screws so that it could not move (R. 263-4).

He testified that the screws remained tight and the quadrant absolutely braked from the time they were fixed at Bremen until after the return there subsequent to the second stranding (R. 264-5). This witness, called by the respondent, was cross examined by the respondent and by the Commissioner in an effort to break him down in this connection; his testimony on this issue appears on pages 263-5, 269-73, 283-4 of the record. Testimony could hardly be more clear and definite, however, that the rudder had not been in contact with anything after sailing from Bremen. The witness testified (R. 273):

> "Q. It would not show in the screws if the rudder had been struck? A. *It would show in the*

screws if the rudder had been struck, yes, it would show.

Q. Then, if the rudder had been struck, the screws would show it? A. *The screws would show it, yes.*

Q. *And the screws didn't show it?* A. No."

On re-direct examination he testified (R. 280):

"Q. The captain has testified that before you came on the bridge, the stern of the 'Isis' touched the bottom. If the lashings were strong enough to hold, and if the quadrant screw was tight enough to hold, how could you tell whether or not the rudder had touched something? A. The rudder can't move, *something would be gone if the rudder had touched the ground.*"

(R. 280-1):

"Q. And as I understand your testimony on cross examination, when you examined the screws on the quadrant, before you started up the river back to Bremen, you saw no paint off? A. No.

Q. And no sign that the quadrant had been moved? A. No, nothing.

Q. All you did was to look at the quadrant, and that is what you saw? A. Yes."

(R. 283):

"Q. Did you examine the lines to this rudder after the second stranding? A. What—the rudder?

Q. Yes, the wire cables that you had down to your rudder—did you examine them after the second stranding? A. Yes, they were not touched.

Q. They had not been touched? A. They had not been touched.

Q. Were not strained in any way?

Mr. Haight: Stretched—pulled out—loose.

A. No, absolutely tight.

Q. They had not been affected in any way? A. No."

This witness testified that he was the one who made fast the lines from the rudder to the bitts, and his testimony is most convincing as to the careful examination he made of the lines and of the quadrant after the second stranding. He unequivocally testified that "something would be gone if the rudder had touched the ground"; and he also testified that nothing was gone.

The libellant's experts testified that if, while lashed, the rudder hit hard enough to be bent, as it was found after the second stranding, the lines would have loosened or given way, or the shackle or ring on the rudder would have been broken. The fact of the impact would be clearly apparent in the condition of the lines (R. 331, 340-2, 356, 370-1).

The respondent's expert, Captain Davis, testified (R. 406):

> "Q. If you have your rudder quadrant fixed with two screws or one screw—there seems to be a difference in the evidence whether it was one screw or two—do you not agree with me that if you have any such impact that it would show in any such screws—is that not so? A. I can't—I would have to see how it was secured to answer that question intelligently, to be sure of my answer.
>
> Q. In any event, the man that fixed it and saw it both before and after the second stranding is in the best position to express an opinion on that, is he not? A. Yes, I should think so."

We have quoted the testimony of the chief officer who made the rudder fast, that any impact was bound to show in the quadrant brake and lashings.

Respondent's counsel argued below that up to the time that the ship turned to starboard to give passage-way to the ascending vessel, no difficulty was experienced in controlling the vessel. They stressed the maneuver book and the pencil markings on the chart as to the ship's position

at various times. As the Commissioner pointed out, however (R. 513), no dependence can be placed on these markings, as the times marked on the chart were merely estimates taken from the maneuver book. After having made these estimates as best he could from the maneuver book, it seems unusual, to say the least, to attempt to compare the movements shown in the maneuver book with the bends appearing on the chart.

The master's testimony establishes that the "Isis" was turned to starboard at about kilometer 16 when an ascending vessel was seen approaching around the bend at Vegesack (R. 98). The testimony also establishes that this vessel was successfully passed a little above kilometer 17 (R. 65). It will be noted that kilometer 17 is about four-tenths of a mile, or 2400 feet, above the buoy at the intersection of the Lesum with the Weser. It is established by the master's testimony that the difficulty in steering the ship was encountered before the "Isis" was affected by the current at the Lesum. The master testified that the difficulty of breaking the sheer to starboard was noticed long before the episode of touching aft to which he had referred (R. 112).

So far as concerns the master's testimony that no difficulty in steering the ship was encountered prior to passing the ascending ship, it is, we submit, of importance to examine the master's testimony before the Board of Marine Inspectors, or "Seeamt", at Bremerhaven. He there testified as follows in relation to the voyage down the Weser River from Bremen (R. 459):

> "In the beginning, everything went smoothly. The commands were called out to the tugs. We then passed two dredging machines and afterwards a small steamer. As we were sailing in the middle of the channel, I told the pilot that it would be better to leave some more room for passing. We

thereupon went over a little to the starboard side, but later we held on again to the middle of the channel. In the meantime, the engines were going steadily. *The vessel, however, did not come back to port, but had the tendency to shear to starboard.*"

It is true that the record is not a verbatim stenographic report of the testimony of the witness, and it is also true that the master denied that he testified as quoted. However, the report of the Board, contains the following (R. 473):

"According to the statements of several witnesses, *particularly according to the declarations of Captain Krueger, the vessel tended, during the entire passage, to swing toward starboard although the maneuvers of the two tugs were supported by the engines of the 'Isis'. The speed was moderate.* According to the statement of the chief engineer Fuhrman supported by the abstract of the engine log book submitted, the port engine had to go astern much more frequently than the starboard engine and this tends to confirm the statements of the witness that the vessel tended to swing to starboard."

The respondent's witness, Wulirmann, was a member of the Board (R. 199). *He testified that the statements made in the findings which he signed, are true* (R. 199-200, 204, 207, 287).

We submit that the master's statements, made immediately after the stranding, before a Board appointed to examine into the cause of the stranding, are entitled to considerably more weight than the master's testimony taken over two years later, at a time when the respondent's interests required that a different position be taken. His statements before the Board are admissions binding on the respondent.

The Potomac, 8 Wall. 590, 594;

The Lisbonense, 53 Fed. 293, 301 (C. C. A. 2nd Circ.);
The W. Talbot Dodge, 15 F. (2d) 459, 460 (S. D. N. Y.);
The Fanwood, 61 Fed. 523, 525 (S. D. N. Y.);
The Bellota, 57 F. (2d) 264, 5 (S. D. N. Y.);
The Enterprise, 8 Fed. Cas. #4497 at p. 731.

The respondent has heretofore stressed the chief officer's testimony that he noted no difficulty in steering while he was on deck. However, the ship did not start down the river until about 2:15 A. M. (R. 267), and he went to his room and to sleep at 2:30 A. M. (R. 267). At the time of the examination of this witness before the Marine Board at Bremerhaven, he testified (R. 461-2):

> "During this trip, I was on the bridge until about 2:30 o'clock. It surprised me that the 'Hoheweg' could not hold the bow of the 'Isis', I did not see the accident happen * * *."

The witness agreed that all his testimony before the Board was true except the statement about the difficulty with the "Hoheweg" (R. 276-7).

We submit that it is a strange coincidence that the records of the Marine Board should be correct in every particular except its record that both the master and the chief officer testified to difficulty in steering the "Isis". Of course the chief officer knew nothing about the difficulties after he went to sleep, but we submit that the chief officer's testimony at Bremerhaven establishes that even before he left the bridge at 2:30, the tugs were having difficulty in keeping the "Isis" from sheering.

It was the master whom the Commissioner found testified untruthfully in relation to the dangerous condition of the rudder. We submit that no known legal principle justifies a finding that, although admittedly he had little regard for the truth when expressing his opinion about

the rudder, he was truthful when he said that he did not testify before the Seeamt as the written record of that court shows; a record which another of the respondent's witnesses, who sat as a member of the court, testified was correct (R. 199-200, 204, 207, 287).

In this connection it is to be noted that the respondent chose to bring to New York and examine the chief officer in an effort to bolster up the master, although he was on deck for only a few minutes after the ship sailed from Bremen, and was sound asleep from then until after the second stranding. The second officer who was on the bridge with the master (R. 122), was not called as a witness. He was the one in a position to support the master's testimony, if it could be supported. The damaging inference to be drawn from the omission to call the second officer is, we think, clear.